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No. 05-1342

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

LINDA A. WATTERS, Commissioner, Michigan Office of Insurance and Financial Services,
Petitioner,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AND U.S. CONFERENCE OF MAYORS, JOINED BY THE CONFERENCE OF STATE BANK SUPERVISORS, AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Amici will address the following question:

> Whether preemptive regulations issued by the Office of the Comptroller of the Currency, which divest the States of all power to regulate state-chartered, non-bank operating subsidiaries of national banks, exceed the OCC's statutory authority and therefore do not qualify for *Chevron* deference.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amicus* Conference of State Bank Supervisors is the national association of state officials who regulate state-chartered banks, non-bank mortgage lenders, and other providers of financial services. Throughout this nation's history, the States have enacted and enforced laws designed to protect consumers against abusive and unfair practices by financial service providers. In particular, the States have taken a leading role in combating predatory mortgage lending practices. *Amici* therefore submit this brief to assist the Court in its resolution of the case.

STATEMENT

The decision below upheld regulations issued by the OCC, which declare that the OCC possesses exclusive authority to regulate state-chartered, non-bank corporations that are operating subsidiaries of national banks.[2] The core of the OCC's preemption claim is set forth in 12 C.F.R. § 7.4006. Section 7.4006 asserts that, unless otherwise provided by federal law, "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." The OCC adopted § 7.4006 in 2001—35 years after the OCC first permitted national banks to establish operating subsidiaries. In 1966, the OCC recognized that operating subsidiaries are "controlled **subsidiary corporations**" used for the purpose, *inter alia*, of "**separating** particular opera-

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[1] The parties have consented to the filing of this *amicus* brief, and their letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, has made a monetary contribution to the preparation or submission of this brief.

[2] Under the OCC's regulations, a subsidiary of a national bank qualifies as an "operating subsidiary" if (1) the subsidiary engages in "activities that are permissible for a national bank to engage in directly," and (2) the parent bank "controls" the subsidiary. 12 C.F.R. § 5.34(e)(1), (2).

tions of the [parent] bank from other operations." 31 Fed. Reg. 11,459, 11,460 (1966) (emphasis added). In adopting § 7.4006 in 2001, the OCC disregarded the separate legal existence of operating subsidiaries and called them "the equivalent of **departments or divisions** of their parent banks." 66 Fed. Reg. 34,784, 34,788 (2001) (emphasis added).

In combination with two other OCC regulations, § 7.4006 divests the States of their authority to regulate the activities and corporate governance of all state-chartered operating subsidiaries. First, 12 C.F.R. § 7.4000(a) provides that "State officials may not exercise any visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law."[3]

Second, under 12 C.F.R. § 7.2000(a), every "corporate governance procedure" of a national bank must "comply with applicable Federal banking statutes and regulations." Federal banking laws and OCC rules dictate many corporate governance matters for national banks, including the appointment and dismissal of officers; requirements for capital stock and dividends; shareholders' voting rights (including a requirement for cumulative voting in all elections of directors); numbers and qualifications of directors; required oaths for directors; and approvals of mergers and consolidations.[4]

By their terms, 12 C.F.R. §§ 7.4000 and 7.2000 apply only to "national banks." However, § 7.4006 makes both rules applicable to state-chartered operating subsidiaries, thereby preempting the States' authority to supervise such corporations' business activities or to regulate their corporate

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[3] The OCC issued 12 C.F.R. § 7.4000 in reliance on 12 U.S.C. § 484(a). As shown below at page 22, § 484(a) limits the exercise of "visitorial powers" only with respect to a "national bank" and does not refer to operating subsidiaries or other "affiliates" of a national bank.

[4] *See* 12 U.S.C. §§ 21-24, 51a-62, 71-76, 214a, 214b, 215-215c; 12 C.F.R. §§ 5.33, 7.2001 – 7.2024.

governance. Similarly, in 12 C.F.R. § 34.1(b), the OCC has asserted that operating subsidiaries engaged in real estate lending are entitled to rely on the same preemptive rules that the OCC has established for national banks in 12 C.F.R. § 34.4.

The decision below concluded that the OCC's regulations preempt several Michigan statutes. Those state statutes require state-chartered, non-bank mortgage lenders doing business in Michigan—including respondent Wachovia Mortgage Corporation ("Wachovia Mortgage")—to register with petitioner Commissioner of the Michigan Office of Insurance and Financial Services ("Commissioner"), to provide annual financial statements and to pay annual fees to the Commissioner, to maintain certain documents for review by the Commissioner, and to permit the Commissioner to conduct investigations of consumer complaints that are not being pursued by the OCC. By upholding the OCC's preemptive rules, the decision below divested the Commissioner of all authority to regulate state-chartered operating subsidiaries of national banks.[5]

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[5] Michigan exempts operating subsidiaries of national banks from some, but not all, of the regulatory requirements that apply to other non-bank mortgage lenders. *See* Pet. App. 2a & n.1, 3a-4a (describing Michigan laws preempted by the OCC's rules); Pet. 5-6 & nn.11-15 (same). Other States require operating subsidiaries to comply more fully with the regulatory requirements that apply to other non-bank mortgage lenders. *See, e.g., Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949, 954-55, 964-65 (9th Cir. 2005) (describing California laws preempted by the OCC's rules); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 310 (2d Cir.) (describing Connecticut laws preempted by the OCC's rules), *petition for cert. filed*, No. 05-431 (Sept. 30, 2005); *National City Bank of Indiana v. Turnbaugh*, __ F.3d, __, 2006 WL 2294843, at *1 & n.1 (4th Cir., Aug. 10, 2006) (describing Maryland laws preempted by the OCC's rules).

SUMMARY OF ARGUMENT

1. The Sixth Circuit Court of Appeals erred when it refused to apply a presumption against preemption of Michigan's laws governing state-chartered, non-bank mortgage lenders. The court also erred in holding that the OCC's preemptive regulations were entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In practical effect, the court created a presumption in favor of the OCC's authority to adopt rules preempting state law—a presumption that could not be overcome without an unambiguous statement of congressional intent to forbid the OCC's regulations. For three reasons, the court's approach was clearly mistaken.

First, the Sixth Circuit should have required the OCC to demonstrate that its preemptive rules were consistent with congressional intent, because "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986). Second, the Sixth Circuit should have applied a presumption against preemption, because (i) this Court has affirmed that federally chartered banks are subject to state law, and (ii) this Court has repeatedly upheld the States' authority to regulate domestic corporations, and to require foreign corporations to comply with state laws designed to assure responsibility and fair dealing. Third, this Court should now hold that *Chevron* does not apply to a federal agency's regulation that claims to preempt state law. Preemption is "an extraordinary power in a federalist system." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Accordingly, the judiciary should undertake a *de novo* review of every preemptive rule to ensure that the federal-state balance is not altered without a deliberate decision by Congress.

2. Even if *Chevron* applies to this case, the OCC's regulations do not qualify for deference unless they were "promulgated pursuant to authority Congress has delegated to the

[OCC]." *Gonzales v. Oregon*, 126 S.Ct. 904, 916 (2006). None of the statutes cited by the OCC and the Sixth Circuit empowered the OCC to preempt the States' authority to regulate state-chartered corporations that are operating subsidiaries of national banks. Without such delegated authority, the OCC is not entitled to *Chevron* deference.

The OCC's rules are not authorized by 12 U.S.C. §§ 371(a), 484(a) or 24(Seventh). All three statutes refer only to national banks and do not mention operating subsidiaries. Operating subsidiaries cannot be treated as "national banks," a term that is expressly defined in 12 U.S.C. §§ 221 and 221a(a). Operating subsidiaries are chartered as non-bank corporations under state law, and they do not meet statutory criteria that national banks must satisfy in order to obtain federal charters under the National Bank Act. Rather, operating subsidiaries must be treated as "affiliates" of their parent national banks under 12 U.S.C. § 221a(b). The OCC has non-exclusive, concurrent authority to obtain reports from affiliates and to examine affiliates under 12 U.S.C. §§ 161(c) and 481. However, §§ 161(c) and 481 do not restrict the States' authority to regulate affiliates. In several statutes enacted since 1982—a period when Congress was well aware of operating subsidiaries—(i) Congress has specifically exempted operating subsidiaries from treatment as "affiliates" for only two narrowly-defined purposes, (ii) Congress has not exempted operating subsidiaries from treatment as "affiliates" under §§ 161(c) and 481, and (iii) Congress has not included any reference to operating subsidiaries in §§ 371(a) and 484(a).

Thus, Congress has established a clear distinction between national banks, on the one hand, and state-chartered, non-bank operating subsidiaries, on the other. Congress has also made clear that an operating subsidiary may not be treated as the equivalent of a national bank. Accordingly, the OCC had no authority to adopt rules that extend the scope of §§ 371(a) and 484(a) to reach operating subsidiaries, thereby obliter-

ating the careful separation that Congress has mandated between national banks and affiliated, non-bank entities.

Nor do 12 U.S.C. §§ 24a and 93a provide any support for the OCC's regulations. Section 24a(g)(3) exempts operating subsidiaries from certain federal statutory requirements that apply to "financial subsidiaries" of national banks (*i.e.*, subsidiaries that may conduct certain activities not permissible for banks). Section 24a(g)(3) is not a power-granting provision, and it does not express any intention to bar the States from regulating operating subsidiaries. When Congress enacted § 24a in 1999, it was understood that "[n]othing in this legislation is intended to affect the authority of national banks to engage in bank permissible activities through subsidiary corporations." S. Rep. No. 106-44, at 8 (1999). At that time, the OCC's regulations did not assert exclusive, preemptive authority over operating subsidiaries.

Under § 93a, the OCC may issue regulations "to carry out the responsibilities of the office." As the statute's carefully limited terms indicate, § 93a does not authorize the OCC to adopt rules that would expand the powers of national banks. When Congress enacted § 93a in 1980, the Senate floor manager for the legislation explained that § 93a "carries with it no new authority to confer on national banks powers which they do not have under existing substantive law." 126 Cong. Rec. 6902 (1980) (remarks of Sen. Proxmire). Thus, § 93a gives the OCC no authority to adopt rules extending the statutory definition of "national bank" to include state-chartered, non-bank operating subsidiaries for purposes of §§ 371(a) and 484(a).

ARGUMENT

THE OCC's REGULATIONS DO NOT QUALIFY FOR *CHEVRON* DEFERENCE.

A. A Presumption Against Preemption Should Be Applied in Determining Whether the OCC Possessed Statutory Authority to Adopt Its Preemptive Rules.

1. *The Sixth Circuit Erred When It Refused to Apply a Presumption Against Preemption.*

In upholding the OCC's rules, the Sixth Circuit refused to apply a presumption against preemption of Michigan's laws governing state-chartered, non-bank mortgage lenders. The court concluded that there was no need to decide "whether Congress has expressly and clearly manifested its intent to preempt state laws such as Michigan's." Pet. App. 7a. In the court's view, the OCC's preemptive rules were valid because there was no evidence of an "unambiguous intent of Congress" that would forbid the regulations. Pet. App. 10a. This reasoning was fundamentally flawed for three reasons.

First, the Sixth Circuit misread this Court's decision in *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982)). *De la Cuesta* does not relieve a reviewing court of its duty to determine whether a federal agency's pre-emptive rule is consistent with congressional intent. In *de la Cuesta*, this Court carefully considered "whether the [Federal Home Loan Bank] Board acted within its statutory authority in issuing [a] pre-emptive . . . regulation." *Id.* at 159. The Court upheld the Board's regulation because the "statutory language" of the Home Owners' Loan Act of 1933 suggested that "Congress expressly contemplated, and approved, the Board's promulgation of regulations superseding state law." *Id.* at 162.

Thus, as this Court explained in *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986), "[t]he critical question in any pre-emption analysis is **always** whether Congress intended that federal regulation supersede state

law" (emphasis added). A court confronted with a preemption claim must therefore determine whether "language in the federal statute . . . reveals an explicit congressional intent to pre-empt state law" or, if not, whether "the federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), and citing *de la Cuesta*, 458 U.S. at 152-53). Hence, the validity of a preemptive rule depends on whether that rule is consistent with congressional intent as manifested in Congress' delegation of authority to the agency:

> [A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of authority granted by Congress to the agency.

Louisiana Pub. Serv. Comm'n, 476 U.S. at 374.

Second, the Sixth Circuit was equally mistaken in concluding that it was required to defer to the OCC's rules under "the framework established by *Chevron*." Pet. App. 7a. The court interpreted *Chevron* as obliging it to "give great weight to any reasonable construction" of the national banking statutes by the OCC, as long as those statutes were "silent or ambiguous." Pet. App. 8a (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403 (1987), and *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995)). However, the court failed to recognize that neither *Clarke* nor *NationsBank* involved an OCC rule that purported to preempt state law. Instead, those cases dealt with OCC opinions interpreting federal statutes that placed limits on the permissible activities of national banks.

By misconstruing *de la Cuesta* and *Chevron*, the Sixth Circuit effectively created a presumption **favoring** the OCC's authority to issue regulations preempting state law—a presumption that could **not** be overcome without evidence that Congress had expressed an "unambiguous intent" to **prohibit** the OCC from adopting such rules. *See* Pet. App. 8a-10a. In this respect, the Sixth Circuit agreed with recent decisions of the Second, Fourth and Ninth Circuits, which also granted *Chevron* deference to the OCC's preemptive rules regarding state-chartered operating subsidiaries.[6] All four courts concluded that the OCC enjoyed free rein to adopt its preemptive regulations in the absence of a "manifest congressional intent" that would forbid such rules.[7] As shown below at pages 15-20, the decisions of all four courts represent a fundamental misapplication of *Chevron*.

Third, the Sixth Circuit concluded that a presumption against preemption was inapplicable because "[r]egulation of federally-chartered banks" is an area that has been "substantially occupied by federal authority for an extended period of time." Pet. App. 7a, n.3 (quoting *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005)). The Second, Fourth and Ninth Circuits took the same position in upholding the OCC's regulations. *See Burke*, 414 F.3d at 314; *Turnbaugh*, 2006 WL 2294843, at *3; *Boutris*, 431 F.3d

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[6] *See* the decisions in *Burke*, *Turnbaugh* and *Boutris*, cited *supra* at p. 3 n.5.

[7] *See Burke*, 414 F.3d at 317-18 (finding "no manifest congressional intent to preclude the OCC regulations in this case" because "no [federal] statute speaks directly to the scope of federal versus state power over [operating subsidiaries]"); Pet. App. 9a-10a (quoting *Burke* and reaching same conclusion); *Turnbaugh*, 2006 WL 2294843, at *4 (stating that "the NBA is silent on whether the OCC may regulate national banks' operating subsidiaries"); *Boutris*, 419 F.3d at 961 (stating that "the [National] Bank Act, is silent" regarding the OCC's authority over operating subsidiaries); *id.* at 959 n.12 (stating that Congress has not "unambiguously expressed [its] intent" to prevent the OCC from issuing its preemptive rules) (internal quotation marks and citation omitted).

at 956. As shown in the next section, all four courts were clearly mistaken in view of this Court's decisions affirming the States' long-established role in regulating national banks and state-chartered corporations. This Court has repeatedly held that "Congress should make its intention clear and manifest if it intends to pre-empt the historic powers of the States." *Gregory v. Ashcroft*, 501 U.S. at 461 (citations and internal quotation marks omitted). Congress has never expressed a clear and manifest intent to preempt the States' authority to regulate state-chartered, non-bank operating subsidiaries.

2. *This Court Has Repeatedly Upheld the States' Authority to Regulate National Banks and State-Chartered Corporations.*

In *Atherton v. FDIC*, 519 U.S. 213, 222 (1997), this Court reaffirmed that "federally chartered banks are subject to state law." As support for that principle, this Court quoted decisions reaching back to an 1870 case, holding that national banks

> are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when State law incapacitates the [national] banks from discharging their duties to the federal government that it becomes unconstitutional.

Id. at 222-23 (quoting *National Bank v. Commonwealth of Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1870)).

Similarly, in *Barnett Bank* this Court held that States have "the power to regulate national banks" where "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." 517 U.S. at 33. In two earlier cases, this Court explained that "the operation of general state laws upon the dealings and contracts of national banks" is the "rule", while preemption is an "exception" that applies only when state laws "expressly conflict with the laws of the

United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States." *First National Bank in St. Louis v. Missouri*, 263 U.S. 640, 656 (1924); *McClellan v. Chipman*, 164 U.S. 347, 357 (1896). All of these decisions are consistent with the presumption against preemption that this Court has applied in fields of traditional state regulation, including state legislation designed to protect consumers against abusive or unsafe practices in the sale of goods or services.[8]

Congress expressed its strong support for the presumptive application of state laws to national banks when it passed the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, 108 Stat. 2338 ("Riegle-Neal Act"). The Riegle-Neal Act requires interstate branches of national banks to comply with host state laws in four broadly-defined areas—community reinvestment, consumer protection, fair lending and intrastate branching—unless federal law preempts the application of such laws to national banks. 12 U.S.C. § 36(f)(1)(A). In explaining why state laws should generally apply to national banks, the conference report on the Riegle-Neal Act declared:

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses and communities. . . .
>
> Under well-established judicial principles, national banks are subject to State law in many significant respects. . . . Courts generally use a rule of construction that avoids finding a conflict between the Federal and

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[8] *E.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 484-85 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516-20 (1992); *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963).

> State law where possible. The [Riegle-Neal Act] does not change these judicially established principles.[9]

By referring to "judicially established principles" under which "national banks are subject to State law in many significant respects," the Riegle-Neal conferees clearly indicated their endorsement of the approach followed by this Court in decisions such as *St. Louis*, *McClellan*, and *Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944).

In addition to disregarding the States' important role in regulating national banks, the Second, Fourth, Sixth and Ninth Circuits overlooked the radical nature of the OCC's attempt to obliterate legal distinctions between national banks and their state-chartered, non-bank operating subsidiaries. The OCC's rules ignore the separate legal status of operating subsidiaries and claim power to override the States' authority to regulate hundreds of state-chartered, non-bank corporations controlled by national banks.[10] In sharp contrast to the OCC's approach, this Court has repeatedly affirmed the authority of each State (i) to supervise comprehensively the corporations it charters, and (ii) to license and regulate companies chartered by other States that transact business within its borders. With regard to locally-chartered companies, this Court has declared that "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987). Furthermore, it "is an accepted part of the business landscape in this country for States to create

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[9] H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

[10] The OCC has published a list of nearly 500 operating subsidiaries of national banks that offer mortgage lending and other financial services to consumers. Many of these subsidiaries, including respondent Wachovia Mortgage, are large institutions carrying on a nationwide business through offices in numerous states. *See* "National Bank Operating Subsidiaries doing Business with Consumers as of 12/31/2005" (available at www.occ.treas.gov/consumer/Report—2006 for Op Sub pdf.pdf).

corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares." *Id.* at 91.

With respect to foreign corporations, this Court has held that each State "is legitimately concerned with safeguarding the interests of its own people in business dealings with corporations not of its own chartering but who do business within its borders." *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 208 (1944). Each State may therefore require foreign corporations to comply with licensing requirements and other regulations designed to "assur[e] responsibility and fair dealing." *Id.* at 210. *Jensen*'s affirmation of the States' authority to regulate foreign corporations is applicable to this case, because respondent Wachovia Mortgage Corporation has obtained a certificate of authority to transact business in Michigan as a foreign non-bank corporation. Pet. 5-6, 20-21.

This Court has consistently interpreted federal statutes to uphold the States' long-established authority to regulate state-chartered corporations, absent compelling evidence of congressional intent to the contrary. *E.g., CTS Corp.*, 481 U.S. at 85-86 (refusing to construe a federal statute to "pre-empt a variety of state corporate laws of hitherto unquestioned validity" because "[t]he longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all [such] state laws . . . it would have said so explicitly").[11] In the field of financial services, this Court has recognized the States' strong interest in regulating both banks and non-bank financial institutions, because "sound financial institutions and honest financial practices are essential to the health of any State's economy and to the well-being of its people." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980).

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[11] *Accord, Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977) ("Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.").

Thus, the States play a vital role in regulating banks and non-bank providers of financial services to protect consumers against fraudulent and abusive practices. Recent studies have shown that state predatory lending laws provide significant benefits to consumers, due to the inadequate protections offered by current federal laws in the area of subprime lending.[12] State attorneys general and other state officials have obtained numerous enforcement orders against financial institutions in order to stop abusive practices such as predatory lending, privacy violations, telemarketing fraud, conflicts of interest among research analysts, manipulation of initial public offerings, and late-trading and market-timing in mutual funds.[13] However, contrary to the long-established principle of corporate federalism, the OCC's rules declare that state officials are barred from taking any enforcement actions against state-chartered operating subsidiaries of national banks.

In addition to its affirmation of state control over state-chartered corporations, this Court has held that the separate legal status of a subsidiary and its parent corporation is "a general principle of corporate law deeply ingrained in our economic and legal systems." *United States v. Bestfoods*,

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[12] *See* Baher Azmy, *Squaring the Predatory Lending Circle*, 57 Fla. L. Rev. 295, 300-03, 350-81, 390-400 (2005); Wei Li & Keith S. Ernst, "The Best Value in the Subprime Market: State Predatory Lending Reforms," Center for Responsible Lending, Feb. 23, 2006 (available at www.responsiblelending.org/reports/stateeffects.cfm); Roberto G. Quercia, Michael A. Stegman & Walter R. Davis, *Assessing the Impact of North Carolina's Predatory Lending Law*, 15 Housing Pol'y Debate No. 3 (Fannie Mae Foundation, 2004), at 573.

[13] *See* Todd Houge & Jay Wellman, *Fallout from the Mutual Fund Trading Scandal*, 62 J. Bus. Ethics 129 (2005); Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Ann. Rev. Banking & Fin. L. 225, 314-16, 348-56 (2004); Erick Bergquist, "Settlement by Ameriquest—A Model for Subprime?," Am. Banker, Jan. 24, 2006, at 9.

524 U.S. 51, 61 (1998) (citation and internal quotation marks omitted); *accord, Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). Accordingly, the Court has consistently applied a presumption that federal statutes embody the principle of corporate separation, absent clear evidence that Congress intended a different result. *See, e.g., Bestfoods*, 524 U.S. at 62; *Dole Food*, 538 U.S. at 475-76. Notwithstanding this fundamental principle, the OCC has erroneously claimed, without statutory support, that operating subsidiaries are "the equivalent of departments or divisions of their parent banks." 66 Fed. Reg. 34,784, 34,788 (2001).

B. *Chevron* Should Not Be Applied to Preemptive Rules Issued by Federal Agencies.

This Court has never ruled definitively on the question of whether *Chevron* applies to preemptive rules issued by federal agencies. In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the petitioner contended that the presumption against preemption of state law "in effect trumps *Chevron*." *Id.* at 743. The petitioner argued that a reviewing court must "make its own interpretation of [the federal statute] that will avoid (to the extent possible) pre-emption of state law." *Id.* at 743-44. After noting the petitioner's argument, the Court assumed, without deciding, that the question of a statute's preemptive effect "must always be decided *de novo* by the courts." *Id.* at 744.

This Court should now hold that the *Chevron* doctrine does not apply to federal agency rules that claim to preempt state law. The judicial branch has an institutional responsibility to undertake a *de novo* review of federal agency preemptive rules to ensure that preemption issues are resolved in accordance with the Constitution's allocation of federal and state powers. As this Court emphasized in *Gregory v. Ashcroft*, 501 U.S. at 460, the power to preempt "is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." *Id.* Accordingly, this Court has required Congress to "make its intention

'clear and manifest' if it intends to pre-empt the historic powers of the States." *Id.* at 461 (citations and internal quotation marks omitted). Indeed, "the whole jurisprudence of preemption" is intended to serve as a means of "maintaining the federal balance" between national and state power. *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring). The judiciary should therefore require any federal agency that adopts regulations preempting the States' traditional powers to demonstrate that the agency has received a clear and manifest delegation of the requisite rulemaking authority from Congress.

The Sixth Circuit's decision demonstrates that, as a practical matter, the granting of *Chevron* deference to preemptive rules will give federal agencies virtually unlimited discretion to override state law so long as "the unambiguous intent of Congress" does not forbid such regulations. Pet. App. 9a-10a. Such a result contravenes the precept that our federal system "may not be compromised without a **congressional decision** to do so—an important requirement in light of the various safeguards against cavalier disregard of state interests created by the system of state representation in Congress." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 331 (2000) (emphasis added). Given the Constitution's "commitment to a federal structure," federal agencies should not be allowed to invoke *Chevron* as a mandate to "interpret ambiguous [statutory] provisions so as to preempt state law." *Id.* While the issue of *Chevron* deference was not discussed in *Gregory*, this Court did express the view that "[w]e must be absolutely certain that Congress intended [to alter the state-federal balance.] '[T]to give the state-displacing weight of federal law to mere congressional **ambiguity** would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'" *Gregory*, 501 U.S. at 464 (quoting L. Tribe, *Constitutional Law* § 6-25, p. 480 (2d ed. 1988)).

Moreover, the OCC's self-interest in issuing preemptive rules provides a special and compelling reason for rejecting

that agency's appeal for *Chevron* deference. Section 7.4006 is one of a series of preemptive rules and opinions that the OCC has issued in recent years. In defending its preemptive rulings, the OCC has declared that preemption of state law is "a significant benefit of the national charter—a benefit that the OCC has fought hard over the years to preserve."[14] The OCC's expansive view of preemption has given national banks a "major advantage" over state banks, because the OCC believes national banks should be free to "conduct a multistate business subject to a single uniform set of federal laws, under the supervision of a single regulator, free from visitorial powers of various state authorities."[15]

The OCC has a powerful self-interest in persuading the largest banks to operate under national charters. Virtually all of the OCC's budget is funded by assessments paid by national banks, and the biggest national banks pay the highest assessments. In response to the OCC's aggressive preemption efforts, several large, multistate banks have recently converted from state to national charters, thereby producing a significant increase in the OCC's assessment revenues.[16] The OCC's record of enforcing consumer protection laws has been described as "relatively lax" and "unimpressive"—a record that is consistent with the OCC's budgetary incentives to adopt policies that encourage large banks to operate under national charters.[17] Given the OCC's obvious financial

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[14] Speech by Comptroller of the Currency John D. Hawke, Jr., on Feb. 12, 2002, quoted in Wilmarth, *supra* note 13, at 236, 274.

[15] *Id.*, quoted in Wilmarth, *supra* note 13, at 236, 274.

[16] *See* Wilmarth, *supra* note 13, at 274-79, 289-93; Arthur E. Wilmarth, Jr., *OCC v. Spitzer: An Erroneous Application of* Chevron *That Should Be Reversed*, 86 BNA's Banking Rep. No. 8, Feb. 20, 2006, at 379, 387.

[17] Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 Temple L. Rev. 70-74, 77-81 (2005) (quote at 81); Wilmarth, *supra* note 13, at 232 (quote), 274-77, 289-93, 306-16, 351-56. *See also* Br. *Am. Cur.* Center for Responsible Lending *et al.*

motives for issuing preemptive regulations, those rules should be denied any deference under *Chevron*.[18]

C. Even If *Chevron* Applies to Preemptive Rules, the OCC's Regulations Do Not Qualify for Deference.

1. *The Sixth Circuit Erred in Concluding that Statutory Ambiguity Mandates Deference.*

Even if this Court determines that the *Chevron* doctrine may properly be applied in reviewing preemptive regulations, the OCC's regulations are not entitled to deference. As explained above, the decisions of the Second, Fourth, Sixth and Ninth Circuits effectively give the OCC carte blanche to issue regulations preempting state law unless Congress has prohibited such regulations by unambiguous statutory language. This Court's recent decision in *Gonzales v. Oregon*, 126 S.Ct. 904 (2006), demonstrates that all four courts failed to understand the prerequisites for *Chevron* deference.

In *Gonzales*, the Court held that "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved." *Id.* at 916. Even if a statute is ambiguous, deference is appropriate under *Chevron* only if a federal agency's regulation is "promulgated pursuant to authority Congress has delegated to the [agency]." *Id.* Moreover, if the agency claims "broad and unusual authority through an implicit delegation" based on "vague terms or ancillary provisions" in the governing statute, the reviewing court may properly conclude that "Congress could not have intended to delegate a decision of such economic and political

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[18] *See* Wilmarth, *supra* note 13, at 232-33, 293-98; *see also* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J. L. & Pub. Pol'y 203, 206-07, 286 (2004) (contending that "the courts should not accord *Chevron* deference to interpretations of law that implicate the self-interest of the issuing agency," because "*Chevron* effectively places the agency's thumb on the judicial scales, which should not be tolerated when the interpretation before the court advances the agency's own self-interest").

significance to an agency in so cryptic a fashion." *Id.* at 921 (internal quotation marks and citations omitted).

Thus, statutory silence or ambiguity is not a sufficient basis for granting deference to a federal agency's regulation under *Chevron*. Instead, "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). Accordingly, a reviewing court must carefully consider—before it applies *Chevron*'s two-step analysis—whether Congress has expressly or implicitly authorized the agency to adopt a regulation to clarify the ambiguity or to fill the gap that the agency has identified in the governing statute. Only if the court answers "yes" to this essential question may the court then apply *Chevron*'s two-step analysis to determine whether the agency's interpretation of the statute is entitled to deference. *See Gonzales v. Oregon*, 126 S.Ct. at 916-22, 925; *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). Moreover, when an agency issues a ruling that significantly expands its jurisdiction or encroaches upon an area traditionally regulated by the States, the reviewing court should be highly skeptical of the agency's claim of implied authority unless the agency can show that its ruling is consistent with persuasive evidence of congressional intent. *See Gonzales v. Oregon*, 126 S.Ct. at 921-22, 924-25.

In *Gonzales*, the United States Attorney General, relying on the Controlled Substances Act ("CSA"), adopted an interpretive rule that barred doctors from prescribing drugs to be used in assisted suicides. The rule was specifically intended to override any state law authorizing state-licensed physicians to prescribe drugs for that purpose. This Court invalidated the rule because (i) the Attorney General's claim of authority would "effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality", and (ii) the "text and structure of the CSA show that Congress did not have this

far-reaching intent to alter the federal-state balance and the congressional role in maintaining it." *Id.* at 925.

In *Am. Bar Ass'n v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), the court followed a similar approach in refusing to give *Chevron* deference to an FTC ruling The ruling classified attorneys as "financial institutions" for purposes of a federal banking statute that required financial institutions to protect the privacy of their customers. The ruling would have enabled the FTC to "extend its regulatory authority over attorneys engaged in the practice of law," *id.* at 468, even though "the regulation of the practice of law is traditionally the province of the states." *Id.* at 471. In striking down the ruling, the court held that "Congress has not made an intention to regulate the practice of law 'unmistakably clear' in the language of the [federal statute]," and "it is not reasonable for an agency to decide that Congress has chosen such a course of action in language that is, even charitably viewed, at most ambiguous." *Id.* at 472 (citations omitted).

The court also rejected the FTC's suggestion that a federal agency's ruling should be entitled to a highly deferential review under "step two" of *Chevron* in any case where the "[federal] statute does not expressly **negate** the existence of a claimed administrative power." *Id.* at 468 (internal quotation marks and citation omitted). The court held that such an application of *Chevron* would be "flatly unfaithful to the principles of administrative law . . . and refuted by precedent. . . . Plainly, if we were to **presume** a delegation of power from the absence of an express **withholding** of such power, agencies would enjoy virtually limitless hegemony." *Id.* (internal quotation marks and citation omitted).

2. *Congress Has Not Authorized the OCC to Prohibit the States from Regulating State-Chartered Operating Subsidiaries.*

Like the agency rulings struck down in *Gonzales v. Oregon* and *ABA v. FTC*, 12 C.F.R. § 7.4006 radically extends a federal agency's authority into an area traditionally regulated

by the States. As shown above, § 7.4006 disregards the legal separation between national banks and their state-chartered, non-bank operating subsidiaries. In combination with two other regulations (12 C.F.R. §§ 7.2000 & 7.4000), § 7.4006 preempts all state authority to regulate such subsidiaries. The Second, Fourth, Sixth and Ninth Circuits each concluded that the OCC's regulations are permissible under some or all of the following statutes—12 U.S.C. §§ 371(a), 484(a), 24(Seventh), 24a and 93a. *See Burke*, 414 F.3d at 311-16; *Turnbaugh*, 2006 WL 2294843, at *2, *4-*5; Pet. App. 5a, 8a; *Boutris*, 419 F.3d at 957-64. However, as shown below, none of those statutes authorizes the OCC to exercise exclusive and preemptive authority over state-chartered operating subsidiaries. Without such delegated authority, the OCC cannot satisfy the "precondition to deference under *Chevron*." *Adams Fruit Co.*, 494 U.S. at 649.

a. Sections 371(a), 484(a) and 24(Seventh) Do Not Authorize the OCC's Rules

Section 371(a) provides that a "national banking association" may make real estate loans "subject to section 1828(*o*) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U.S.C. § 371(a). Thus, under § 371(a), the OCC's regulations may prescribe "restrictions and requirements" **only** with respect to real estate loans made by a "national banking association." In addition, the OCC's regulations under § 371(a) must be consistent with the uniform interagency real estate lending standards adopted by all of the federal banking agencies under 12 U.S.C. § 1828(*o*). Those uniform standards apply **only** to national banks and other FDIC-insured depository institutions.[19] Neither § 371(a) nor

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[19] *See* 57 Fed. Reg. 62,890 (1992) ("Summary" of final rule, stating that the federal banking agencies "have adopted a final uniform rule on real estate lending by insured depository institutions . . . as required by [12 U.S.C. § 1828(*o*)"]).

§ 1828(*o*) makes any reference to state-chartered, non-bank operating subsidiaries of national banks.

Section 484(a) provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice" or exercised under congressional authority. 12 U.S.C. § 484(a). Thus, state officials may not examine national banks, except as authorized in § 484(b), and state officials also may not bring administrative enforcement proceedings (*e.g.*, for cease-and-desist orders or civil money penalties) against national banks. *See First Union National Bank v. Burke*, 48 F. Supp. 2d 132 (D. Conn. 1999). Like §§ 371(a) and 1828(*o*), § 484(a) refers **only** to national banks and does not mention operating subsidiaries.

By adopting 12 C.F.R. §§ 34.1(b) and 7.4006, the OCC attempted to extend the scope of 12 U.S.C. §§ 371(a) and 484(a) to reach operating subsidiaries of national banks. The OCC had no authority to take that step, because §§ 371(a) and 484(a) apply only to national banks and operating subsidiaries cannot qualify for treatment as national banks. The term "national bank," as used in §§ 371(a) and 484(a), is defined in 12 U.S.C. §§ 221 & 221a(a). As those statutes and related federal laws make clear, a "national bank" is a financial institution that (i) obtains a federal charter to conduct the "business of banking," pursuant to 12 U.S.C. §§ 21-24, 26-27; (ii) is required to become a member of the Federal Reserve System ("FRS") under 12 U.S.C. § 282; and (iii) is eligible to become an FDIC-insured bank under 12 U.S.C. §§ 1813(a)(1), (c)(2) & (4), 1814-16.

Operating subsidiaries do **not** qualify for treatment as "national banks" under §§ 221 and 221a(a), because

- they are chartered as **non-bank** corporations under **state** law;
- they do **not** receive a federal charter to conduct the "business of banking";

- they **cannot** qualify to become members of the FRS; and
- they are **not** eligible to receive deposit insurance from the FDIC.

Rather, operating subsidiaries must be treated as "affiliates" of national banks under 12 U.S.C. § 221a(b), which defines "affiliate" to include "any corporation" that is controlled by a national bank. Under 12 C.F.R. § 5.34(e)(2), an operating subsidiary must be controlled by its parent national bank. Thus, an operating subsidiary is unquestionably an "affiliate" of its parent bank under § 221a(b).

Under 12 U.S.C. §§ 161(c) and 481, the OCC may obtain reports from affiliates and may examine affiliates in order to assess the relationships between those entities and national banks. However, §§ 161(c) and 481 do not restrict the States' authority to regulate affiliates. To confirm this preservation of concurrent state authority over affiliates, Congress has not included any reference to "affiliates" in either § 371(a) or § 484(a). As this Court has repeatedly observed, "'it is generally presumed that Congress acts intentionally and purposely' when 'it includes particular language in one section of a statute but omits it in another.'" *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)). Accordingly, §§ 371(a) and 484(a) must be construed to apply only to national banks and not to "affiliates."

Under 12 U.S.C. §24(Seventh), a "national banking association" has authority "[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking." Like §§ 371(a) and 484(a), § 24(Seventh) refers only to national banks and does not mention "affiliates." This Court has noted that § 24(Seventh) "by its terms applies **only** to banks," while "[o]rganizations affiliated with banks . . . are dealt with by **other sections** of the [Banking] Act [of 1933]." *Board of Governors v. Inv. Co. Instit.*, 450 U.S. 46, 58-59 n.24 (1981) (emphasis added). Section 24(Seventh) may give

national banks the "incidental power" to own operating subsidiaries, but it does not express any congressional purpose to preempt state regulation of such subsidiaries. In *Marquette National Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978), this Court concluded that 12 U.S.C. § 85 preempted state usury laws with regard to national banks, but the Court expressly declined to decide whether that preemption extended to operating subsidiaries. *Id.* at 307-08.

When the statutes dealing with "affiliates" were enacted as part of the Banking Act of 1933, the Senate committee report expressed the committee's intent "[t]o **separate as far as possible** national . . . banks from **affiliates of all kinds**," and "[t]o install a satisfactory examination of affiliates". S. Rep. No. 73-77, at 10 (1933) (emphasis added). To accomplish these goals, Congress adopted three statutes—12 U.S.C. §§ 52, 161(c) & 481. Section 52 requires national banks to separate their own stock from the stock of their affiliates. *See* S. Rep. No. 73-77, at 16 (1933) (discussing §18 of the 1933 Act). As noted above, §§ 161(c) and 481 grant the OCC a non-exclusive and concurrent right to obtain reports from affiliates of national banks and to examine such affiliates. *See* S. Rep. No. 73-77, at 10, 17.

In *Burke*, the Second Circuit dismissed the significance of Congress' treatment of "affiliates." In that court's view, the 1933 Act "targeted national banks' use of affiliates to engage in non-commercial banking and does not address national banks' use of operating subsidiaries to engage in the business of banking." 414 F.3d at 317.

In fact, Congress knew about three types of national bank subsidiaries that carried on portions of the banking business in 1933. At that time, subsidiaries of national banks could (1) operate a safe-deposit business, Act of Feb. 25, 1927, § 2(b), 44 Stat. 1227 (codified at 12 U.S.C. § 24(Seventh)); (2) own bank premises, Act of June 16, 1933, § 14, 48 Stat. 184 (codified at 12 U.S.C. § 371d); and (3) conduct international banking activities, Federal Reserve Act, § 25(a), 41 Stat. 378

(codified at 12 U.S.C. § 615). The 1933 Act exempted all three types of subsidiaries from 12 U.S.C. § 371c, which limits financial transactions between national banks and their "affiliates." However, all three types of subsidiaries were treated as "affiliates" of national banks under 12 U.S.C. §§ 161(c) and 481. Act of June 16, 1933, §§ 2(b), 13, 27 & 28, 48 Stat. 162, 183, 191-93; *see also* S. Rep. No. 73-77, at 15, 17 (1933) (explaining that "[c]ertain types of affiliates" were exempted from § 371c, while "all types of affiliates" were subject to §§ 161(c) & 481). Thus, Congress clearly intended in 1933 that national bank subsidiaries carrying on portions of the banking business—like operating subsidiaries today—would be treated as "affiliates" except under 12 U.S.C. § 371c.

Congress reaffirmed this regulatory regime in 1982 and thereafter, when it did know about operating subsidiaries, which were first authorized by the OCC in 1966. *See* 31 Fed. Reg. 11,459 (1966). In 1982, Congress exempted operating subsidiaries from treatment as "affiliates" **solely** for purposes of the restrictions on financial transactions between national banks and their affiliates under 12 U.S.C. § 371c. Act of Oct. 15, 1982, § 410(b), 96 Stat. 1515 (codified at 12 U.S.C. § 371c(b)(2)(A)). In 1987, Congress granted a similar exemption **solely** for purposes of the limitations on non-financial transactions between national banks and their affiliates under 12 U.S.C. § 371c-1. Act of Aug. 1, 1987, § 102(a), 101 Stat. 565 (codified at § 371c-1(d)(1)). These special exemptions in §§371c and 371c-1 make clear that operating subsidiaries must be treated as "affiliates" under **other** federal banking statutes. Indeed, Congress did not exempt operating subsidiaries from treatment as "affiliates" when it subsequently amended §§ 161(c) and 481. *See* Act of Sept. 23, 1994, § 308(a), 108 Stat. 2218; Act of Dec. 19, 1991, § 114(b), 105 Stat. 2248.

Moreover, Congress has repeatedly indicated its intention not to bring operating subsidiaries within the scope of 12

U.S.C. §§ 371(a) and 484(a). Congress did not insert any reference to operating subsidiaries when it amended §§ 371(a) and 484(a) in 1982. Act of Oct. 15, 1982, §§ 403(a) & 412, 96 Stat. 1510, 1521. Similarly, Congress did not include any mention of operating subsidiaries when it amended § 484(a) in 1983, or when it amended § 371(a) in 1991. Act of Jan. 12, 1983, § 23(a), 96 Stat. 2510; Act of Dec. 19, 1991, § 304(b), 105 Stat. 2354.

Thus, in the 1933 Act and in several statutes adopted since 1982, Congress has established a clear distinction between national banks, on the one hand, and non-bank subsidiaries carrying on discrete portions of the banking business, on the other. In several statutes enacted since 1982, Congress—despite its familiarity with operating subsidiaries—(i) has not exempted operating subsidiaries from treatment as "affiliates" under §§ 161(c) and 481, and (ii) has not included any reference to operating subsidiaries in 12 U.S.C. § 371(a), which grants real estate lending powers to national banks, or in 12 U.S.C. § 484(a), which limits the exercise of visitorial powers over national banks.

In view of the foregoing statutes, the OCC had no authority to adopt 12 C.F.R. §§ 34.1(b) & 7.4006. The OCC's regulations unlawfully extend the scope of §§ 371(a) and 484(a) to reach operating subsidiaries, thereby obliterating the careful separation that Congress has mandated between national banks and their non-bank affiliates. As this Court declared in *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 485 (2001), an agency "may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion."

b. Sections 24a and 93a Do Not Authorize the OCC's Rules.

The OCC also lacked authority to adopt its preemptive rules under 12 U.S.C. §§ 24a and 93a. Section 24a was enacted in 1999 as § 121(a)(2) of the Gramm-Leach-Bliley Act, 113 Stat. 1338, 1373 ("GLBA"). Section 24a permits

national banks to establish "financial subsidiaries" to engage in certain activities (e.g., securities underwriting and dealing) that are not lawful for banks. Under § 24a(g)(3), the term "financial subsidiary" does not include a subsidiary that "engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks." The purpose of § 24a(g)(3) is to exempt operating subsidiaries from federal statutory requirements (e.g., capital levels, managerial ratings, and community reinvestment standards) that apply to financial subsidiaries under §24a(a)-(f). Section 24a(g)(3) is not a power-granting provision, and it does not express any intention to bar the States from regulating operating subsidiaries. Indeed, when Congress adopted § 24a, it was understood that "[n]othing in this legislation is intended to affect the authority of national banks to engage in bank permissible activities through subsidiary corporations." S. Rep. No. 106-44, at 8 (1999). At that time, the OCC's regulations did not assert exclusive, preemptive authority over operating subsidiaries.

Indeed, § 24a was intended to **restrict**—not expand—the OCC's authority over operating subsidiaries. The conference report on GLBA expressed the conferees' view that the OCC should rescind a prior regulation, which allowed operating subsidiaries to conduct activities that were not lawful for national banks. H.R. Rep. No. 106-434, at 160 (1999) (Conf. Rep.), *reprinted in* 1999 U.S.C.C.A.N. 245, 255. The OCC responded in 2000 by amending 12 C.F.R. § 5.34(e)(3) to stipulate that operating subsidiaries may conduct only activities permissible for national banks.[20] Thus, § 24a(g)(3) reflects the GLBA conferees' intention to **limit** the OCC's authority to prescribe the powers of operating subsidiaries.

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[20] *See* 65 Fed. Reg. 12,905, 12,909 (2000) (explaining that the OCC amended 12 C.F.R. § 5.34(e)(3) in response to GLBA, which "makes clear that an operating subsidiary may engage only in activities that are permissible for the parent bank to engage in directly").

Accordingly, § 24a(g)(3) cannot reasonably be construed as a justification for the OCC's preemptive regulations.

Under 12 U.S.C. § 93a, the OCC may issue regulations "to carry out the responsibilities of the office." When § 93a was enacted in 1980, the Senate floor manager for the legislation declared that § 93a "is only available to carry out the responsibilities of the [OCC] and **carries with it no new authority to confer on national banks powers which they do not have under existing substantive law."** 126 Cong. Rec. 6902 (remarks of Sen. Proxmire) (emphasis added).[21] In *Conference of State Bank Supervisors v. Conover*, 710 F.2d 878 (D.C. Cir. 1983) (per curiam), the court similarly held that § 93a allows the OCC to issue preemptive rules "[s]o long as [the OCC] does not authorize activities that run afoul of federal laws governing the activities of national banks." *Id.* at 885. Subsequently, the same court confirmed that "[n]ational banks, being creatures of statute, possess **only those powers conferred upon them by Congress**." *Indep. Ins. Agents of Am. v. Hawke*, 211 F.3d 638, 640 (D.C. Cir. 2000) (citations omitted; emphasis added). The court therefore struck down an OCC ruling that sought to expand the powers of national banks beyond the limits established by Congress. *Id.* at 643-45.

In view of the OCC's narrowly limited rulemaking power under § 93a, the OCC had no authority to adopt regulations that expand the term "national bank" to include state-chartered, non-bank operating subsidiaries for purposes of 12 U.S.C. §§ 371(a) and 484(a). In *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361 (1986), this Court struck down a regulation of the Federal Reserve Board, which expanded the statutory definition of "bank" set forth in the

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[21] *See also* H.R. Rep. No. 96-842, at 83 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 298, 313 (stating that § 93a "carries with it no authority to permit otherwise impermissible activities of national banks with specific reference to the provisions of the McFadden Act and the Glass-Steagall Act").

Bank Holding Company Act ("BHC Act"), 12 U.S.C. § 1841(c). The Board argued that the definition of "bank" should be extended to reach "nonbank banks," because such entities were "'functionally equivalent' to banks." *Id.* at 363-64, 373. This Court held, however, that the Board could not disregard the limits on its authority established by the "plain language" of the BHC Act. *Id.* at 373-74. The Court also rejected the Board's attempt to rely on its power to adopt rules to "administer and carry out the purposes of the [BHC Act] and prevent evasions thereof," under 12 U.S.C. § 1844(b). The Court held that § 1844(b) "only permits the Board to police within the boundaries of the [BHC] Act; it does not permit the Board to expand its jurisdiction beyond the boundaries established by Congress." *Id.* at 373 n.6. Similarly, 12 U.S.C. § 93a does not allow the OCC to extend the statutory definition of "national bank" under 12 U.S.C. §§ 221 & 221a(a) so that it includes state-chartered, non-bank operating subsidiaries.

Given the States' historic role in protecting their citizens from abusive financial practices, the OCC could not lawfully adopt rules preempting the States' authority to regulate operating subsidiaries without a clear and manifest delegation of authority from Congress. *See Gregory v. Ashcroft*, 501 U.S. at 461, 464. Congress has never expressed an intention to delegate such power to the OCC, and the OCC's rules are therefore invalid.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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